Farewell (for now) to the SAT and ACT in UC admissions

Overview

In September 2020, an Alameda County judge issued a preliminary injunction prohibiting University of California undergraduate campuses from accepting SAT or ACT test scores for admissions or financial aid purposes.[1] In a seventeen-page order, Judge Brad Seligman found that the UC's current "test-optional" policy constituted unlawful discrimination toward persons with disabilities under California's Education Code and Unruh Civil Rights Act. This article discusses the unique constitutional deference and autonomy the UC system receives, explains why it is still subject to certain legislative regulation, and outlines both the case and possible future developments.

Analysis

Didn't the UC system already plan to stop using standardized tests?

Sort of. In May 2020, the UC Regents voted to phase out the system's SAT and ACT testing requirements over a five-year period. Until then, prospective students are allowed to submit standardized test scores to supplement their applications or financial aid eligibility (a "test-optional" policy). The policy allowed UC schools to use a student's voluntarily-submitted test scores as a factor in admissions through the 2022 admissions cycle.[2] In the 2023 and 2024 admissions cycles, UCs could only use voluntarily submitted scores to determine scholarship eligibility and course placement. Only in the 2025 admissions cycle would the use of SAT and ACT scores be completely eliminated — and, by then, the Regents hoped to create a standardized test that would be ready for use.

This current test-optional policy is the subject of *Smith v. Regents of the University of California*, Alameda Superior Court case number RG19046222. Plaintiffs, which include five individual students and six community organizations, requested that the UCs be barred from using the SAT and ACT tests for admissions determinations

because the tests violated the state's disability discrimination laws. Before discussing the individual arguments, it is worth discussing the unique status that the UC system holds vis-à-vis state regulation.

The UC system is generally autonomous from state regulation

The UC system holds a high degree of independence and autonomy from both state and local regulation. The section of the California constitution that establishes the UC system provides the UC Regents with near-exclusive authority to organize and govern university affairs.[3] Courts have interpreted this section as a limitation on "the Legislature's power to regulate either the university or the regents" — a contrast to the "comprehensive power" the legislature holds over state agencies.[4] Consequently, the UC system operates "as independently of the state as possible,"[5] and the Regents hold general rulemaking authority and "general immunity from legislative regulation."[6]

Yet the UC system is not entirely immune from legislative control. As described in *Campbell v. Regents of Univ. of California*,the UC system is subject to three areas of regulation:

> *"(1) [T]he Regents cannot compel appropriations for university salaries, because the Legislature is vested with the power of appropriation; (2) statutes that express the state's general police power, such as workers' compensation laws, apply to the Regents; and (3) when legislation regulating public agency activity addresses matters of statewide concern not involving internal university affairs, the legislation may be made applicable to the Regents."[7]*

And the California Supreme Court recently rejected the UC Regents' argument for an absolutist view of "hierarchical sovereignty" in *City and County of San Francisco v. UC Regents*, holding that even a semi-sovereign state constitutional entity like the UC system can be required to collect and remit a local tax.[8] Thus, the UC system may be generally autonomous, but it is not wholly immune from outside influence.

Exceptions for state disability rights protections

Two of the exceptions listed in *Campbell* make a trio of state disability rights laws —

Education Code sections 66240 and 11135, and the Unruh Act — applicable to the UC system. These three laws form the core of the plaintiffs' allegations in *Smith*: by allowing students to submit standardized test scores in support of admissions, the UC system discriminated against students who were unable to access the tests.

Education Code sections 11135 and 66240 are examples of legislation regulating public agency activity on a matter a statewide concern — namely, preventing discrimination. Specifically, section 11135 bars any state-operated or state-funded program or activity from denying access to persons on the basis of "sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation."[9] Section 66240 similarly bars all postsecondary education institution that receives "state financial assistance or enrolls students who receive state financial aid" from discriminating against persons based on the characteristics listed in section 11135.[10] UC is therefore subject to these statutes because they generally apply to all state-funded activities and do not involve internal university affairs.

UC is subject to the Unruh Act because it is an exercise of the police power that governs private persons and corporations. The Unruh Act prohibits several forms of discrimination, including discrimination on the basis of disability.[11]

Smith v. UC Regents **shows how those protections apply to admissions tests**

The use of standardized test scores in undergraduate admissions has been the subject of significant public debate. Even before the COVID-19 pandemic, the SAT and ACT tests faced scrutiny for alleged bias, with some commenters questioning their overall utility. These concerns form the heart of the *Smith* plaintiffs' allegations: the SAT and ACT serve as a discriminatory proxy for a student's socioeconomic background and race;[12] they are relatively inaccessible to students with disabilities;[13] and they provide little predictive value for a student's collegiate performance.[14] According to plaintiffs, continued use of those tests by UC in admissions decisions discriminated against students with disabilities and from marginalized backgrounds, and the source of that discrimination — the tests — was an ineffective predictor of college success.

The UC Regents argued lack of standing, failure to demonstrate intentional discrimination, and holistic admissions processes that diminished the influence of test scores in application review.[15] Their principal arguments focused on plaintiffs' lack of empirical evidence to support their claims; specifically, that no empirical data existed to show that the test-optional policy adversely affected students with disabilities.[16] And regardless of statistics demonstrating a disparate impact on disadvantaged students, UC argued that plaintiffs failed to demonstrate that the UC system intentionally adopted the tests to discriminate against certain groups.[17]

Ultimately, Judge Seligman ruled for plaintiffs and enjoined the UC system from using SAT and ACT test scores for admissions or scholarship decisions. Judge Seligman rejected UC's evidentiary arguments, noting that while there was a "paucity" of data on the effect of test-optional policies, relief did not require "proof of [] ultimate impact."[18] Instead, relief hinged upon whether "the inability of persons with disabilities to avail themselves of the test option . . . is a denial of meaningful access to an opportunity of benefit that persons without disabilities enjoy."

Judge Seligman found that UC's test-optional policy provided a plus-factor[19] to those able to take the SAT and ACT.[20] Although any applicant could invoke the test-optional policy and submit scores, applicants with disabilities lacked meaningful access to the test relative to their counterparts — and thus lacked meaningful access to the benefits of the policy. And while many UC institutions incorporated a holistic admissions review process, Judge Seligman concluded that a test-providing applicant still retains "the benefit of a higher score" or a "second look."[21] Finally, while students with disabilities could apply to no-test UC campuses, Judge Seligman ruled that relegating students to "only a few of the UC campuses" did not constitute meaningful access.

Based on these findings, Judge Seligman issued an injunction barring UC schools from using a test-optional policy.

Conclusion

The Court of Appeal has issued a temporary stay on Judge Seligman's ruling, ordered an expedited briefing schedule on the UC's petition for writ of supersedes,

and requested both parties address "whether any conditions should be imposed in the event supersedes is granted." Expedited review is necessary because UC applications are accepted between November 1 and November 30, which requires telling applicants what may be submitted when the application period opens. Until then, the fate of *Smith* and the UC system's test-optional policy hangs in the balance as an estimated 170,000 students prepare to submit a college application in a school year unlike any other in California.

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Bob Wu is a third-year student at UC Hastings and executive SCOCAblog editor of the *Hastings Law Journal*. This piece is dedicated to the memory of Buck Delventhal, who, in addition to his nearly fifty years of service to the City and County of San Francisco and the municipal law community, taught state and local government law to Bob and countless other Hastings students.

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[1] Bob Egelko and Nanette Asimov, Judge bars University of California from all use of SAT, ACT scores in admissions, San Francisco Chronicle September 1, 2020.

[2] Though all UC undergraduate institutions are allowed to use the test-optional policy, three institutions (Berkeley, Santa Cruz, and Irvine) eliminated the use of tests entirely.

[3] Cal. Const., art. IX, § 9; see also 30 Ops.Cal.Att.Gen. 162, 166 ("[T]he power of the Regents to operate, control, and administer the University is virtually exclusive.").

[4] *San Francisco Labor Council v. Regents of Univ. of Cal.* (1980) at 788.

[5] *Regents of Univ. of Cal. v. Superior Court* (1976) at 537 (holding that the UC system is so autonomous that it is subject to usury laws that were applicable toward private persons and private educational institutions).

[6] *San Francisco Labor Council* (1980) at 788.

[7] *Campbell v. Regents of Univ. of Cal* (2005) at 327 (citing *San Francisco Labor Council* (1980) at 789).

[8] (2019) 7 Cal.5th 536, 560.

[9] Gov. Code § 11135.

[10] Gov. Code § 66270.

[11] Civ. Code § 51.

[12] Specifically, plaintiffs claim that SAT and ACT scores strongly correlate to race and wealth: historically, the strongest predictors of UC applicants' SAT and ACT test scores include parents' level of education, family income, and race. *See* Complaint at ¶ 54–64 (discussing data demonstrating these predictors as "proxies" for scores) and ¶ 123–127 (discussing the prevalence of expensive test preparation courses). Plaintiffs also discussed the challenges multilingual learners faced on the exams, *see id.* at ¶ 94–99, and how norm-referenced (curved and statistically reliable) tests create a cyclical loop discriminating against underrepresented students. *See id.* at ¶ 86–90.

[13] *See id.* at ¶ 104–122 (describing challenges in finding accessible testing locations and receiving accommodations).

[14] *See id.* at ¶ 65–83.

[15] *See* Reply at 14–24.

[16] *Id.* at 10–11.

[17] *Ibid.*

[18] Order at 10.

[19] *Id.* at 5 ("Counsel for UC conceded . . . [that] test results can only help, and never hurt, an applicant. Put another way, the tests are treated as a plus factor and thus test-submitters are given a second opportunity for admissions consideration.").

[20] *Id.* at 10.

[21] *Ibid.*